KELAB SUKAN PULAU PINANG & ANOR

v.

VIJAYAPAL SINGH HIRA SINGH & ANOR & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: P-02-339-1995]
15 MAY 1997

ADMINISTRATIVE LAW: *Exercise of judicial functions - Inferior tribunal - Industrial Court - Decision making process of - Termination of workmen on grounds of redundancy - Propriety - Different findings by Industrial Court - Failure to apply same criteria to all workmen - Whether decision making process flawed - Whether fatal*

LABOUR LAW: *Industrial court - Termination of workmen for redundancy - Duty of Industrial Court - Whether open to Industrial Court to make different findings in respect of dismissals - Whether dutybound to apply same criteria to all workmen - Industrial Relations Act 1967, ss. 5(2)(a), 13(3)(d)*

The 1st respondent ('Singh') and one Mohammad Noor ('Noor') in this case were employed by the 1st appellant ('the Club') as restaurant captain and food and beverage executive respectively and were attached to the Club's restaurant and bar. In 1989 the Club privatised the running of the restaurant and bar to a private caterer and thereafter terminated the services of both Singh and Noor.

The dispute relating to the dismissal came before the Industrial Court whereupon a joint statement of case was filed by Singh and Noor. In an award handed down on 23 September 1994 ('the Award'), the Chairman found as a fact that Noor's termination for redundancy was justified but ordered that the Club reinstate Singh with wages, increments and bonus backdated to September 1989. Noor had subsequently obtained leave to file for *certiorari,* and following that, the High Court ruled that the Award was a nullity as the Club was not a legal entity. The Club and its secretary have since appealed against this decision.

The facts also showed that on 7 March 1995 the Club applied to the learned judge for extension of time to apply for leave to file *certiorari* against the Award and for a stay of execution of the same. This application was dismissed by the learned judge on the ground of undue delay. The learned judge however allowed the Club's application for stay of execution in respect of RM50,000

which the Club had deposited with Singh's solicitor pending this appeal. Against the learned judge's refusal to extend time the Club has also appealed.

Held:
Per Mahadev Shankar JCA

[1] In so far as the Club's appeal against the refusal of the trial judge to extend time to apply for leave was concerned, leave ought to be given because the whole of the Award was quashed. The order that was made by the trial judge in Noor's application had quashed the Award altogether. Being a single award which jointly affected both Singh and Noor, its effect was to deprive Singh of any benefits that the Award had conferred on him. That being so, the whole issue as to whether the decision making process could be impugned became wide open.

[2] The question of whether or not the Club is a legal entity was a mere technicality which the Industrial Court, under s. 29(5) of the Industrial Relations Act 1967, should not have regard of. Also, having themselves initiated the complaint to the Minister and in the Industrial Court in the present format, it was not open to Singh or Noor to take such a point. There was never any doubt in anybody's mind about the identity of the employer against whom they were seeking relief.

[3] Once the Chairman found as a fact that the closing down of the restaurant by the Club was done *bona fide* because of the losses being incurred and that the termination of Noor's services was for an established redundancy, the Award in so far as it concerned Noor could not be impugned.

[3a] The Chairman's decision making process in so far as Singh was concerned, however, was fatally flawed, because, having correctly stated the criteria as regards Noor, he failed to apply the same criteria as regards Singh. To compound the error further the Chairman had also backdated Singh's emoluments till 15 September 1989 when Singh had done no work at all in the interim. What applied to Noor must equally apply to Singh. On the facts the only finding open to the Chairman was that both jobs had become redundant.

[4] In so far as Singh was concerned, the Club's appeal against the order of the court below was therefore allowed. That apart, the Award of the Chairman, in so far as it directed the reinstatement of Singh and further directed any payments to be made to him, was quashed. Singh's dismissal was justified and the money deposited by the Club with Singh's solicitors should be returned.

[5] In so far as the Club's appeal in the case of Noor was concerned, it was directed that the order of *certiorari* made in the court below be set aside. It is further ordered that his dismissal for redundancy do stand.

[Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Responden pertama ('Singh') dan seorang Mohammad Noor ('Noor') dalam kes ini masing-masingnya bekerja sebagai Kapten Restoran dan Eksekutif Makanan dan Minuman di Restoran dan Bar kepunyaan perayu pertama ('Kelab'). Pada tahun 1989 Kelab telah menswastakan pengurusan Restoran dan Bar tersebut kepada pihak ketiga dan selepas itu telah menamatkan perkhidmatan kedua-dua Singh dan Noor.

Pertikaian berhubung pemberhentian kerja ini telah dirujuk kepada Mahkamah Perusahaan di mana Singh dan Noor telah memfailkan satu pernyataan kes secara bersesama. Dalam award yang diberikan pada 23 September 1994 ('Award'), Pengerusi telah membuat keputusan fakta bahawa pemberhentian kerja Noor kerana kelebihan kakitangan adalah wajar tetapi memerintahkan supaya Kelab mengambil semula Singh dengan gaji, kenaikan dan bonus berkuatkuasa dari September 1989. Noor kemudiannya telah memperolehi kebenaran untuk memfailkan *certiorari*, dan berikutan itu, Mahkamah Tinggi memutuskan bahawa keseluruhan Award adalah satu nullity oleh kerana Kelab bukanlah suatu entiti di sisi undang-undang. Kelab beserta dengan setiausahanya merayu terhadap keputusan ini.

Fakta juga menunjukkan bahawa pada 7 Mac 1995 Kelab telah memohon kepada yang arif hakim untuk perlanjutan masa untuk memohon kebenaran untuk memfail *certiorari* terhadap Award dan untuk penggantungan pelaksanaan Award tersebut. Permohonan ini telah ditolak oleh hakim yang bijaksana atas alasan kelewatan yang keterlaluan. Hakim yang bijaksana bagaimanapun telah membenarkan permohonan Kelab untuk penggantungan pelaksanaan berhubung dengan RM50,000 yang telah diserahsimpan oleh Kelab dengan peguamcara Singh sementara menunggu rayuan ini. Kelab seterusnya merayu terhadap keengganan yang arif hakim membenarkan perlanjutan masa ini.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Berhubung rayuan Kelab terhadap keengganan yang arif hakim untuk membenarkan perlanjutan masa untuk memohon kebenaran, kebenaran harus diberi oleh kerana keseluruhan Award telah dibatalkan. Perintah yang dibuat oleh hakim perbicaraan berkaitan permohonan Noor telah

membatalkan keseluruhan Award. Oleh kerana Award yang satu itu telah sama-sama melibatkan Singh dan Noor, kesannya adalah untuk menyingkirkan Singh dari mendapat apa jua manafaat yang diberikan oleh Award tersebut kepadanya. Dalam keadaan ini, keseluruhan isu samada proses membuat keputusan boleh disangkal menjadi terbuka luas.

[2] Soal samada Kelab merupakan satu entiti di sisi undang-undang hanyalah perkara teknikal yang tidak harus diambil berat oleh Mahkamah Perusahaan di bawah s. 29(5) Akta Perhubungan Perusahaan 1967. Juga, oleh kerana mereka sendiri yang memulakan aduan kepada Menteri dalam format yang ada sekarang, ianya tidak terbuka bagi Singh dan Noor untuk menonjolkan isu ini. Tidak wujud apa-apa keraguan berhubung dengan identiti majikan terhadap siapa mereka memohon relif.

[3] Sebaik sahaja Pengerusi memutuskan sebagai satu fakta bahawa penutupan Restoran oleh Kelab adalah dibuat secara *bona fide* disebabkan oleh kerugian yang ditanggung dan bahawa pemberhentian kerja Noor adalah kerana kelebihan kakitangan yang telah pun dibuktikan, Award tersebut setakat mana ianya melibatkan Noor tidak boleh lagi dipersoalkan.

[3a] Proses membuat keputusan oleh Pengerusi setakat yang berhubung dengan Singh, bagaimanapun, adalah cacat dengan cara yang memudaratkan, oleh kerana, setelah menyatakan dengan tepat kriteria yang terpakai kepada Noor, beliau gagal untuk menggunapakai kriteria yang sama terhadap Singh. Menambah lagi kesilapannya, Pengerusi telah juga memerintahkan emolumen Singh berkuatkuasa dari 15 September 1989 sedangkan dalam tempoh tersebut tidak ada kerja dibuat oleh Singh. Di atas fakta keputusan yang terbuka kepada Pengerusi hanyalah bahawa kedua-dua pekerjaan telah menjadi berlebihan.

[4] Setakat mana ianya berhubung dengan Singh, rayuan Kelab terhadap perintah mahkamah di bawah adalah dengan itu dibenarkan. Selain itu, Award Pengerusi tersebut, setakat mana ianya mengarahkan pengambilan semula Singh dan mengarah selanjutnya supaya bayaran-bayaran dibuat kepadanya, adalah dibatalkan. Ianya adalah keputusan kami bahawa pemberhentian kerja Singh adalah wajar dan untuk itu wang yang diserahsimpan oleh Kelab dengan peguamcara Singh hendaklah dipulangkan.

[5] Berkaitan dengan rayuan Kelab dalam kes Noor, adalah diperintahkan bahawa perintah *certiorari* di mahkamah di bawah diketepikan. Dan diperintahkan selanjutnya bahawa pemberhentian Noor atas alasan kelebihan kakitangan adalah betul.

[Perintah sekadarnya.]

Legislation referred to:
Industrial Relations Act 1967, ss. 5(2)(a), 13(3)(d), 29(5)

[Appeal from High Court Malaya, Pulau Pinang; Originating Motion No: 25-20-95]

For the appellant - P Navaratnam; M/s Vello & Assoc
For the respondents - Darshan Singh; M/s Darshan Singh & Co

JUDGMENT

Mahadev Shankar JCA:

Vijayapal Singh ('Singh') was employed with effect from 1 March 1987 as 'Restaurant Captain' by the Kelab Sukan Pulau Pinang ('the club'). Mohammad Noor bin Abu Bakar ('Noor') was employed by the club with effect from 15 January 1984 as the Food and Beverage Executive. Noor was responsible for the supervision and proper running of the club restaurant and bar.

Because the restaurant and bar was continually running at a loss the general committee of the club decided to privatise it and hand-over the running thereof to a private caterer with effect from 1 October 1989, under the style of Fu Shen Restaurant. The club decided that in the circumstances it would have to terminate the services of Singh and Noor. It issued letters of termination to both of them on 15 September 1989. The termination letters were accompanied with cheques for termination benefits calculated in accordance with the provision of the Employment Act. The club requested the caterer to absorb Noor and Singh into his establishment but he refused.

Singh and Noor were both dissatisfied with the termination. They applied for relief to the Minister in accordance with the provisions of the Industrial Relations Act. On 28 September 1990 the Minister referred the dispute to the Industrial Court.

This reference was initiated by Noor and Singh. They named the parties to the dispute as Kelab Sukan Pulau Pinang and themselves. They filed a joint statement of case (Case No. 2/4-253/90) which they intituled:

BETWEEN

KELAB SUKAN PULAU PINANG

AND

1. MOHAMMAD NOOR BIN ABU BAKAR

2. VIJAYAPAL SINGH A/L HIRA SINGH

This pleading was so filed with the benefit of legal advice from an eminent firm of solicitors. The case was eventually heard on 16 and 17 September 1994.

The chairman of the Industrial Court made his Award on 23 December 1994 (the Award). In the Award the chairman found as a fact that the restaurant was running at a loss, forcing the club to reorganise its services, and found as a fact that the termination of Noor for redundancy was justified. There were three other bars in the club. Each had its own captain. Each of them was senior to Singh. At the time of the hearing in 1994 evidence was given that the business in these three bars was good. So the chairman decided that the club should employ Singh as an additional captain because it was prudent to have an extra captain when any of the other three have their rest days or were on vacation, and he ordered the club to reinstate Singh within one month with wages, increments and bonus backdated to 15 September 1989.

This Award was only served by the court or the club's solicitors on 30 December 1994 by the Industrial Court Penang. On 6 February 1995 Noor's solicitors applied for leave to file for *certiorari* and obtained the same on 27 February 1995. Pursuant thereto they filed the substantive Motion No. 25-8-95 on 1 March 1995. The matter came on for hearing on 29 June 1995. Mr. Darshan Singh for Noor strenuously argued that the Award was a nullity because Kelab Sukan Pulau Pinang was not a legal entity. The learned judge adjourned the matter for consideration. On 25 July 1995 he held that the Award was a nullity for the reason aforesaid and quashed it. The Notes of Evidence reads:

Keputusan

Semua prosiding di Mahkamah Perusahaan 'nullity' sebab pihak responden tidak wujud.

Permohonan *certiorari* Perintah (1), (2) & (6) dibenar dengan kos.

The club and its secretary have appealed to us against this decision.

The club's solicitors did not move with equal alacrity as regards the Award with respect to Singh. Application for leave to file *certiorari* must be made within six weeks of the Award. Even if we compute the period from 30 December 1994 they should have moved the court by 11 February 1995. The club committee apparently only instructed their solicitor to apply by letter date 13 February 1995. The lawyer says he received this letter on 17 February 1995, got the papers ready and served it on Singh's solicitor on 2 March 1995 and filed it on 7 March 1995.

The reasons advanced for this delay did not impress the judge in the court below. He heard the application for extension of time on 20 April 1995 together with the application for leave and for a stay of execution of the Award. On 24 April 1995 the learned trial judge dismissed the application for extension of time. He mistakenly stated that there was a delay of 75 days but this is not critical. Apparently Singh was already back in the club but the back wages had been deposited with his solicitors. The judge allowed their application for stay of execution in relation to RM50,000 deposited pending the appeal to the Court of Appeal which was subsequently registered as P-02-339-1995.

As earlier indicated the point about the Award being a nullity was ventilated in Noor's application which was heard on 29 June 1995. The same point was raised in the course of the hearing of the club's application against Singh on 24 April 1995 but it was not dealt with because the club could not get an extension of time.

When the two appeals came on together on 10 October 1996 the counsel for both parties agreed we had the jurisdiction to dispose all the outstanding applications.

We first dealt with the club's appeal against the refusal of the trial judge to extend time to apply for leave. Mr. Navaratnam emphasised the alleged extenuating circumstances and the merits of this appeal. Mr. Darshan Singh relied very heavily on the delay and appeared to suggest that the existence of merits was irrelevant. Our difficulty was that the order made by the judge in Noor's application quashed the Award altogether. In other words being a single Award which jointly affected both Singh and Noor its effect was to deprive Singh of any benefits the Award conferred on him. We had to give leave because the whole Award was quashed. The whole issue as to whether the decision making process could be impugned thus became wide open.

The cross-appeal by Mr. Darshan Singh against the stay order became academic because we proceeded to hear both the appeals immediately thereafter.

The first issue was whether the Award was a nullity because the club was not a legal entity. With respect to Mr. Darshan Singh this was a mere technicality. As pointed out by YA Gopal Sri Ram in the course of hearing, s. 29(5) of the Industrial Relations Act (the Act) 1967 reads:

> The court shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities and legal forms.

Having themselves initiated the complaint to the Minister and in the Industrial Court in this format we hold that it was not open to Singh or Noor to take such a point. There was never any doubt in anybody's mind about the identity of the employer against whom they were seeking relief.

Once the chairman found as a fact the closing down of the restaurant by the club was done *bona fide* because of the losses being incurred and that the termination of Noor's services was for an established redundancy the Award in so far as it concerned Noor could not be impugned.

However the chairman's decision making process in so far as Singh was concerned was fatally flawed because having correctly stated the criteria as regards Noor, he failed to apply the same criteria as regards Singh. The only conclusion open to the chairman was that Singh's employment had also been terminated for redundancy because the position in which he was employed in the restaurant no longer existed.

Section 5(2)(a) of the Act reads:

> (2) Sub-section (1) shall not be deemed to preclude an employer from –
>
> (a) refusing to employ a person for proper cause, or not promoting a workman for proper cause,or suspending, transferring, laying-off or discharging a workman for proper cause.

And s. 13(3)(d) reads:

> (3) Notwithstanding sub-s. (1), no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say:
>
> (d) the termination by an employer of the services of a workman by reason of redundancy or by reason of the reorganisation of an employer's profession, business, trade or work or the criteria for such termination;

These are managerial prerogatives. The chairman recognised them when he quoted AC Malhotra at p. 16 of this Award, and followed up with his own findings. The passage reads:

> AC Malhotra in his book *Dismissal, Discharge, Termination Of Service & Punishment* (7th Edn.) had stated:
>
> > But the rule of 'Last Come, First Go' would have obviously no application to the case of retrenchment of the only employee in a particular category of workmen. In such a case it is retrenchment of the post itself and therefore, if for reasons of economy and any genuine interest of reorganisation the services of a single employee of a category have to be dismissed, there is no scope for the application of this principle.

> The club has the right to re-organise its business and in so doing it must ensure that such reorganisation is *bona fide* and not capricious. In our case after privatisation the 1st claimant's position was no more in existence. The club had satisfied this court that the redundancy was in fact the real reason for the 1st claimant's dismissal.

The same criteria applied equally to Singh. It does not seem to have occurred to the chairman that what he was doing by compelling the club to reinstate Singh was to create a post for him as a stand-by captain who would only have work as and when any of the other three captains fell ill, or were taking rest or went on vacation. In other words Singh would have been idle at other times. To compound the error even further the chairman backdated Singh's emoluments till 15 September 1989, when Singh had done no work at all in the interim. What applies to Noor applies equally to Singh. On the facts before him the only finding possible was that both jobs had become redundant.

The Industrial Court was concerned with the club's position in September 1989. There was overwhelming and irrefutable evidence that the restaurant/bar was making losses and had been for quite some time before that. Indeed the club's accounts which are in evidence shows losses for the previous years as well. To say that the other three bars were doing good business in September 1994 is an irrelevant consideration which the chairman should not have allowed to influence his mind in reinstating Singh the way he did.

In so far as Singh is concerned we therefore allowed the club's appeal against the order of the court below and quashed the Award of the chairman in so far as it directed the reinstatement of Singh and further directed any payments to be made to him. We substituted a finding that Singh's dismissal for redundancy was justified and the money deposited by the club with Singh's solicitors be returned. In the exercise of our discretion we made no order for costs in this appeal here or in the court below but the security deposit will be refunded to the appellant.

In so far as the club's appeal in the case of Noor is concerned we directed that the order of *certiorari* made in the court below and his consequential reinstatement be set aside. We further ordered that his dismissal for redundancy do stand. We also ordered here that there be no order for costs here or in the court below but that the deposit be refunded to the appellant.

Reported by Rusnah Abd Aziz